

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

May 14, 2002

IN RE:)	
)	
DOCKET TO ESTABLISH)	DOCKET NO.
GENERIC PERFORMANCE)	01-00193
MEASUREMENTS, BENCHMARKS)	
AND ENFORCEMENT)	
MECHANISMS FOR BELL SOUTH)	
TELECOMMUNICATIONS, INC.)	

**ORDER SETTING PERFORMANCE MEASUREMENTS, BENCHMARKS
AND ENFORCEMENT MECHANISMS**

This matter came before the Tennessee Regulatory Authority ("Authority" or "TRA") during a regularly scheduled Authority Conference held on April 16, 2002, for consideration of the establishment of performance measurements, benchmarks and enforcement mechanisms to be implemented through interconnection agreements entered into between BellSouth Telecommunications, Inc. ("BellSouth") and Competing Local Exchange Carriers ("CLECs"). Upon reviewing the record of this docket and Docket No. 99-00430,¹ the Directors voted unanimously to adopt the performance measurements, benchmarks and enforcement mechanisms attached hereto.

Procedural History

At a regularly scheduled Authority Conference held on February 21, 2001, the Authority opened this docket to develop a common set of performance measurements,

¹ *In re Petition for Arbitration of ITC^DeltaCom Communications, Inc. with BellSouth Telecommunications, Inc. Pursuant to the Telecommunications Act of 1996*, TRA Docket No. 99-00430 (hereinafter "BellSouth/DeltaCom Arbitration").

benchmarks and enforcement mechanisms to ensure that BellSouth provides nondiscriminatory access to its network elements as required by the Telecommunications Act of 1996.² Concurrent with the establishment of this docket, the Authority adopted, as a base, the performance measurements, benchmarks and enforcement mechanisms ordered in TRA Docket No. 99-00430, the BellSouth/DeltaCom Arbitration.³ The Authority appointed Director H. Lynn Greer, Jr. to serve as the Pre-Hearing Officer in this proceeding.

On March 12, 2001, the Executive Secretary issued a Notice requesting comments from all interested parties on the following issues:

1. Should the performance measurements, benchmarks and enforcement mechanisms as adopted be revised? If so, specify what changes should be made and provide supporting rationale.
2. Should a change control process be considered in this docket? If so, provide supporting rationale and details of the process you recommend.

AT&T Communications of the South Central States, Inc. ("AT&T"), ATM-Discount Communications, Inc. ("ATM-Discount"), the CLEC Coalition,⁴ ACCESS Integrated

² This docket was created, in large part, as a response to a request by BellSouth through its Petition filed in TRA Docket No. 00-00392 (*BellSouth Telecommunications, Inc. Petition to Convene Generic Docket and to Resolve Pending Arbitration Issues*). In that Petition, and in subsequent filings in TRA Docket No. 99-00430, the *BellSouth/DeltaCom Arbitration*, and in this docket, BellSouth expressed its desire that the TRA resolve arbitration issues of performance measurements, benchmarks and enforcement mechanisms in a generic docket, rather than on a piecemeal basis. This docket is in essence an extension of the BellSouth/DeltaCom Arbitration in that the Authority ordered that "[t]hese measures and mechanisms (in DeltaCom) should remain in effect permanently or until this Authority conducts a generic proceeding to adopt permanent performance measures and enforcement mechanisms applicable to all CLECs." *BellSouth/DeltaCom Arbitration (Interim Order)* (Issued August 11, 2000) p. 12.

³ *BellSouth/DeltaCom Arbitration (Final Order of Arbitration)* (Issued February 23, 2001); *see also* (*Order on Reconsideration and Denying Joint Motion*) (Issued June 26, 2001) pp. 7-8.

⁴ The following providers are members of the CLEC Coalition: AT&T, ACCESS Integrated Networks, Inc., the Association of Communications Enterprises, Birch Telecom of the South, Inc., Brooks Fiber Communications of Tennessee, DIECA Communications d/b/a COVAD Communications Company, ICG Communications, Inc., MCImetro Access Transmission Services, LLC, Mpower Communications Corporation, Time Warner Telecom of the Mid-South, L.P. and XO Tennessee, Inc.

Networks, Inc. ("ACCESS") and BellSouth Telecommunications, Inc. ("BellSouth") filed Comments on April 6, 2001.

At a Pre-Hearing Conference held on May 1, 2001, the Pre-Hearing Officer granted Petitions to Intervene filed by the following parties: ACCESS, the Association of Communications Enterprises, Inc., AT&T, ATM-Discount, BellSouth, Birch Telecom of the South, Inc. ("Birch"), Brooks Fiber Communications of Tennessee, Inc., DIECA Communications d/b/a COVAD Communications Company ("COVAD"), ICG Communications, Inc., MCImetro Access Transmission Services, LLC ("MICmetro"), Mpower Communications Corporation ("Mpower"), NewSouth Communications, Southeastern Competitive Carriers Association ("SECCA"), Time Warner Telecom of the Mid-South, L.P. ("Time Warner") and XO Tennessee, Inc. ("XO").

The Pre-Hearing Officer also established a procedural schedule and took judicial notice of the record in the BellSouth/DeltaCom Arbitration. After considering the parties' comments, the Pre-Hearing Officer decided to remove Issue No. 2 ("change control") from this docket. Finally, the Pre-Hearing Officer encouraged the parties to file joint stipulations on those performance measurements adopted in the BellSouth/DeltaCom Arbitration to which they had no objection. The procedural schedule required the parties to file all pre-filed direct testimony by July 9, 2001 and all pre-filed rebuttal testimony by August 3, 2001.

On June 15, 2001, the Pre-Hearing Officer issued the *Initial Order on Discovery Disputes*. In addition to resolving controversies arising during discovery, the Order modified dates in the procedural schedule requiring all pre-filed direct testimony be filed by July 16, 2001 and all pre-filed rebuttal testimony by August 10, 2001. On July 16,

2001, the CLEC Coalition filed the testimony of Cheryl Bursh and Robert Bell, Ph.D. Birch filed the testimony of Tad Jerret Sauder, COVAD filed the testimony of Thomas E. Allen, ACCESS filed the testimony of Rodney Page, ATM-Discount filed the testimony of Morris "Nick" Harris, Time Warner filed the testimony of Tim Kagele, WorldCom, Inc. filed the testimony of Karen Kinard, and BellSouth filed the testimony of Edward J. Mulrow, Ph.D. and David A. Coon.

On July 31, 2001, the Authority issued a Notice informing the parties that a hearing in this docket was scheduled from August 20 through 24, 2001. BellSouth filed the Rebuttal testimony of David Coon, Edward Mulrow, Ph.D., Ronald Pate and William Taylor, Ph.D. Birch filed the Rebuttal testimony of Tad Jerret Sauder on August 10, 2001. WorldCom, Inc. filed the Rebuttal testimony of Karen Furbish.

On August 10, 2001, KMC Telecom III, Inc. and KMC Telecom V, Inc. filed a *Petition for Limited Intervention*, which was granted by the Pre-Hearing Officer on August 13, 2001. On August 15, 2001, the Pre-Hearing Officer granted US LEC of Tennessee's ("US LEC") *Petition to Intervene*, which was filed on June 28, 2001. Also, on August 15, 2001 the Pre-Hearing Officer granted Mpower's *Motion to Withdraw Petition to Intervene*. Mpower's motion was based on its assertion that it would no longer provide service in Tennessee.

On August 15, 2001 all parties sponsoring witnesses filed a *Motion to Establish Order of Parties and Witnesses*. The Pre-Hearing Officer granted the Motion on August 16, 2001 and established the order of parties and witnesses to be presented at the Hearing. On August 16, 2001, the Pre-Hearing Officer also issued a Notice requiring the parties to complete a Matrix, attached to the Notice, prior to the outset of the Hearing. The Matrix

listed performance measurements, benchmarks and enforcement mechanisms adopted in prior TRA Orders. The parties were asked to identify whether they agreed or disagreed with the Baseline Measures included therein and, if not, to propose an alternative.

On August 16, 2001, Broadslate Networks, Inc. ("Broadslate") filed a *Petition to Intervene*. On August 17, 2001, Broadslate filed a *Motion to Submit Direct Testimony*, seeking to file the testimony of John Spilman, Broadslate's Director of Regulatory Affairs and Industry Relations concerning four incidents of purportedly anti-competitive conduct on the part of BellSouth or its agents. BellSouth filed its Response to *Broadslate's Petition to Intervene* and the *Motion to Submit Direct Testimony*. BellSouth opposed both filings.

The Hearing of August 20 through August 23, 2001

The Hearing in this docket was held before the Directors of the Authority from August 20 through August 23, 2001. The parties in attendance at the Hearing included:

BellSouth Telecommunications, Inc. – **Guy M. Hicks, Esq.**, 333 Commerce Street, 22nd Floor, Nashville, TN 37201-3300 and **Phillip Carver, Esq.** and **R. Douglas Lackey, Esq.**, 675 West Peach Street, Suite 4300, Atlanta, GA 30375;

AT&T Communications of the South Central States, Inc. – **James P. Lamoureux, Esq.**, **William Prescott, Esq.** and **Michael Hopkins, Esq.**, 1220 Peachtree St., N.E., Room 8990, Atlanta, GA 30309;

Time Warner Telecom of the Mid-South, L.P. and NewSouth Communications – **Charles B. Welch, Jr., Esq.**, Farris, Mathews, Brannan, Bobango & Hellen, 618 Church Street, Suite 300, Nashville, TN 37219;

ACCESS Integrated Networks, Inc., ATM-Discount Communications, Inc., Birch Telecom of the South, Inc., Broadslate Networks, Inc., DIECA Communications d/b/a COVAD Communications Company, ICG Communications, Inc., Southeastern Competitive Carriers Association, US LEC of Tennessee, and XO Tennessee, Inc. – **Henry Walker, Esq.**, Boulton, Cummings, Conners & Berry, 414 Union Street, Suite No. 1600, Nashville, TN 37219-8062.

MCIWorldCom – **Susan Berlin, Esq.**, 6 Concourse Parkway, Atlanta, GA 30328.

KMC Telecom III, Inc. and KMC Telecom V, Inc. – **H. LaDon Baltimore, Esq.**, Farrar & Bates, 211 7th Ave., Nashville, TN, 37219.

As a preliminary matter, the Directors granted Broadslate's *Petition to Intervene* and denied its *Motion to Submit Direct Testimony*, finding that the filing was untimely.

At the Hearing, BellSouth presented the following witnesses: William E. Taylor, Ph.D., Ronald M. Pate, David A. Coon and Edward J. Mulrow, Ph.D. Mr. Pate addressed primarily the issues of change management and service request flow-through issues. Dr. Taylor addressed economic issues related to the performance plan adopted in the BellSouth/DeltaCom Arbitration. Mr. Coon testified regarding proposed changes to the performance measurements and enforcement mechanisms adopted in the BellSouth/DeltaCom Arbitration. Dr. Mulrow, a Manager for Ernst & Young, testified on the statistical methodology for determining whether BellSouth is providing parity and BellSouth's proposed penalty calculation.

Rodney Page testified on behalf of ACCESS regarding difficulties ACCESS has experienced in accessing BellSouth's operational support systems. Tad Jerret Sauder testified on behalf of Birch regarding its proposed changes to the performance measures adopted in the BellSouth/DeltaCom Arbitration. Thomas E. Allen, Jr.'s testimony on behalf of COVAD focused on several metrics that he asserted would ensure that providers of digital subscriber line ("DSL") receive nondiscriminatory treatment. Morris Harris testified regarding difficulties with BellSouth's operational support system experienced by ATM-Discount, a local exchange reseller. Tim Kagele testified on behalf of Time Warner, requesting that high capacity special access services provided by BellSouth be incorporated into this docket. Karen Kinard testified on behalf of MCIWorldCom in support of certain changes to the performance measurements adopted in the

BellSouth/DeltaCom Arbitration and adopted the testimony of Karen Furbish on special access. Robert Bell, Ph.D., and Cheryl Bursh testified on behalf of AT&T. Dr. Bell proposed changes to the statistical methodology adopted in the BellSouth/DeltaCom Arbitration and Ms. Bursh proposed changes to the enforcement mechanisms adopted in the BellSouth/DeltaCom Arbitration. The CLEC witnesses generally supported the results of the BellSouth/Deltacom Arbitration with some modest revisions.

The Authority adjourned the Hearing upon the completion of all testimony on August 23, 2001. On October 9, 2001, BellSouth, WorldCom, the CLEC Coalition, Birch and Time Warner filed Post-Hearing Briefs.

Findings of Fact and Conclusions of Law

A. Introduction and Definitions

In 1995, the General Assembly enacted the Tennessee Telecommunications Act of 1995 (the "1995 Act"), which significantly altered the manner in which Tennessee regulated public utilities.⁵ The passage of the 1995 Act reflected a new policy in Tennessee telecommunications regulation that encouraged greater competition for local telecommunications services and eased certain traditional regulatory constraints on local telephone companies.⁶

Congress adopted a similarly pro-competitive policy a year later with the passage of the Telecommunications Act of 1996 (the "1996 Act"). The 1996 Act fundamentally restructured local telephone markets by ending the monopoly of local service held by the

⁵ See 1995 Tenn. Pub. Acts, ch. 408; Tenn. Code Ann. § 65-5-201 *et seq.*

⁶ See *BellSouth Telecommunications, Inc. v. Greer*, 972 S.W.2d 663, 666 (Tenn. Ct. App. 1997); Tenn. Code Ann. § 65-4-123.

incumbent Bell operating companies.⁷ Congress designed the 1996 Act to “open[] all telecommunications markets to competition,” by establishing “a pro-competitive, deregulatory national policy framework” that sought to eliminate the barriers that CLECs faced in offering competing local telephone service.⁸

To stimulate effective competition, the 1996 Act requires incumbents to offer CLECs three means of gaining access to local telephone networks: [1] by selling local telephone services to the CLECs at wholesale rates for resale to end users; [2] by leasing network elements to CLECs on an unbundled basis; and [3] by interconnecting a requesting CLEC’s network with their own.⁹ Network elements and interconnection must be offered at “rates, terms, and conditions that are just, reasonable, and nondiscriminatory.”¹⁰ Further, the 1996 Act allows incumbents to enter the long distance market only after satisfying certain statutory conditions, including providing nondiscriminatory access to network elements in accordance with the requirements of 47 U.S.C. §§ 251(c)(3) and 252(d)(1) and receiving the approval of the Federal Communications Commission (“FCC”).¹¹ “The purpose [of these requirements] is to encourage these locally-dominant companies to open up their local markets to competition while preventing them from curtailing competition in the long-distance market or unfairly leveraging their own entry into that market.”¹²

⁷ See 47 U.S.C. § 151 *et seq.*; see also *In the Matter of Bell Atlantic New York for Authorization under Section 271 of the Communications Act*, 220 F.3d 607, 611 (D.C. Cir. 2000).

⁸ *Id.* (quoting S. Conf. Rep. No. 230, 104th Cong., 2d Sess. 1 (1996)).

⁹ *Id.* (citing 47 U.S.C. § 251(c)(2)-(4)).

¹⁰ 47 U.S.C. § 251(c)(2)(D), (c)(3).

¹¹ See 47 U.S.C. § 271. A consent decree arising from a 1982 antitrust suit brought by the Department of Justice permitted incumbents to provide local service in their respective regions, but barred them from providing long distance services. See *SBC Communications, Inc. v. FCC*, 138 F.3d 410, 412 (D.C. Cir. 1998).

¹² *AT&T Corp. v. U.S. West Communications, Inc.*, No. C98-634WD, 1998 WL 1284190 at * 1 (W.D. Wash. June 4, 1998).

To implement the 1996 Act, Congress sought the assistance of state regulatory agencies. In what has been termed “cooperative federalism,”¹³ Congress

partially flooded the existing statutory landscape with specific preempting federal requirements, deliberately leaving numerous islands of State responsibility . . . No generalization can therefore be made about where, as between federal and State agencies, responsibility lies for decisions. The areas of responsibility are a patchwork and the dividing lines are sometimes murky¹⁴

Certain provisions of the 1996 Act, such as those related to arbitrating and approving interconnection agreements, mandate that State commissions apply federal law within their existing State procedural structures.¹⁵ In some instances, federal preemption is deferred and conditional, triggered on a case-by-case basis.¹⁶

The Authority’s duty to ensure that the CLECs have nondiscriminatory access to all essential unbundled network element (“UNE”) processes, including pre-ordering, ordering, provisioning, maintenance and repair and billing, is cognizable under both state and federal law.¹⁷ Consistent with this responsibility, the Authority has established cost based UNE rates and arbitrated numerous interconnection agreements between BellSouth and the CLECs.

¹³ *Southwestern Bell Telephone Co. v. Connect Communication Corp.*, 225 F.3d 942, 948 (8th Cir. 2000).

¹⁴ *Bell Atlantic Maryland, Inc. v. MCIWorldCom, Inc.*, 240 F.3d 279, 300 (4th Cir. 2001), *cert. granted sub nom.*, *Verizon Maryland Inc. v. Public Service Comm’n of Maryland*, 122 S.Ct. 679, 151 L.Ed.2d 591 (2001).

¹⁵ See 47 U.S.C. § 252(c), (e); see also, e.g., 47 U.S.C. § 251(f) (mandating that State commissions conduct inquiries for the purpose of terminating rural telephone company exemptions); 47 U.S.C. § 332(c)(7) (requiring local zoning boards to apply federal procedural standards in approving the siting of telecommunications towers and facilities).

¹⁶ See, e.g., 47 U.S.C. § 252(e)(5) (directing the FCC to issue an order “preempting the State commission’s jurisdiction” over a proceeding if the State commission “fails to act to carry out its responsibility”); 47 U.S.C. § 253(d) (directing the FCC to “preempt the enforcement” of any State statute or regulation that has the effect of denying a carrier the ability to provide any interstate or intrastate telecommunications service).

¹⁷ See Tenn. Code Ann. §§ 65-4-123, 65-4-124(a) and (b); 47 U.S.C. § 251; Direct testimony of Cheryl Bursh (filed July 16, 2001) p. 4; Direct testimony of David Coon (filed July 16, 2001) pp. 3-4; Direct Testimony of Karen Kinard (filed July 16, 2001) pp. 61-2; Rebuttal testimony of William Taylor (filed August 10, 2001) p. 4; Hearing testimony of William Taylor (August 21, 2001) pp. 15-6.

The purpose of performance measurements, benchmarks and self-effectuating enforcement mechanisms is to provide a mechanism for establishing, assessing and enforcing the level of service BellSouth provides to CLECs to assure nondiscriminatory access to all essential UNEs.¹⁸ Absent nondiscriminatory access to these UNEs, the CLECs' ability to offer Tennessee consumers quality service in a timely manner is limited, thereby thwarting the statutorily mandated policy of fostering competition among telecommunication service providers.

The performance measurements, benchmarks and enforcement mechanisms adopted herein also provide a vehicle for determining whether BellSouth provides nondiscriminatory access to its network elements, one of the requirements that must be satisfied before BellSouth's application to provide interLATA long distance service pursuant to 47 U.S.C. § 271 can be approved. In addition, the performance plan establishes a system of enforcement mechanisms to deter backsliding once BellSouth earns § 271 approval in Tennessee. The performance plan provides a framework for gathering and utilizing all relevant information and includes proper and effective incentives for BellSouth to provide CLECs nondiscriminatory access to its network. In addition, the performance plan provides BellSouth and the CLECs with a stable and enduring reduction in regulatory uncertainty until competitive market forces can substitute for the performance plan. These are the fundamental characteristics of a successful performance plan, which is essential to the rapid and robust evolution of local and long distance competition in Tennessee.

Performance measurements, which are also called metrics or measures, refer to the various elements of BellSouth's UNE processes, including pre-ordering, ordering,

¹⁸ See Tenn. Code Ann. § 65-4-124(a) and (b).

provisioning, maintenance and repair and billing, that are measured to glean the data in ways that allow assessment of the levels of service BellSouth provides to CLECs. Performance measurements are evaluated through the use of benchmarks or parity standards which represent levels of service that BellSouth must meet in order to provide nondiscriminatory access to applicable UNEs.

A benchmark is an absolute standard usually related to the amount of time BellSouth takes to perform a particular function and the accuracy with which BellSouth performs. A parity standard is a relative standard that requires BellSouth to provide service to CLECs that is in parity with the service that BellSouth provides to its retail operations. When parity standards are imposed both CLEC performance and BellSouth's retail performance must be measured. Enforcement mechanisms provide the means for imposing remedies as incentive for BellSouth to meet the established benchmarks.

A single performance measurement may be broken down into sub-measurements, or components of the aggregate measure, that provide more precise information about performance. This process is called disaggregation. For example, an aggregate measurement of the average installation time for all lines may be broken down into a disaggregated measurement of business and residential lines. Breaking the total of all lines into such categories provides more specific data for measuring performance. The business lines could be further disaggregated by type, such as "Plain Old Telephone Service" (POTS), Centrex, or xDSL, to show levels of service provided for specific products.¹⁹

¹⁹ POTS is an acronym for basic telephone service supplying a standard, single telephone line with no features. Centrex is a business telephone service offering a single line telephone service to individual desks with features. xDSL is a generic digital subscriber line that includes ADSL, asymmetric digital subscriber line, HDSL, high-bit rate digital subscriber line, IDSL, integrated digital subscriber line and SDSL, symmetrical digital subscriber line.

Disaggregation provides specific information that might otherwise be lost in an aggregate measurement. Thus, disaggregation is useful when trying to pinpoint a problem or in assessing enforcement mechanisms because it ensures that poor performance in one product type is not aggregated with superior service of another unrelated product type. Such aggregation could mask either particular strengths or particular defects in BellSouth's performance.

Certain performance measurements included in the attached exhibits are categorized as "parity by design." A parity by design measure occurs when BellSouth and CLEC orders are processed in a manner that makes it impossible for BellSouth to distinguish between the two, making discrimination impossible.

Business rules provide the specifics required to completely understand all aspects of the performance measurements. For example, business rules define exactly when the time periods for measuring intervals begin and end.

Special access is any dedicated line from a customer to interexchange carriers provided by a local telephone company.²⁰ Its components include local loops, interoffice transport and multiplexing.²¹

B. The Performance Measurements, Benchmarks and Enforcement Mechanisms Ordered in The BellSouth/DeltaCom Arbitration

Concurrent with the establishment of this docket, the Authority adopted as a base or starting point, the performance measurements, benchmarks and enforcement mechanisms ordered in the BellSouth/DeltaCom Arbitration pursuant to 47 U.S.C. § 252.

²⁰ See Harry Newton, *Newton's Telecom Dictionary*, 640 (Telecom Books 1998); see also Rebuttal testimony of Karen Furbish (filed August 8, 2001) (Attachment 2, entitled: "Measurements & Standards in the Ordering, Provisioning and Maintenance and Repair of Access Service") p. 4.

²¹ Rebuttal testimony of Karen Furbish (filed August 8, 2001) p. 4.

The performance measurements adopted in the BellSouth/DeltaCom Arbitration included the Service Quality Measurements (SQMs) proposed by BellSouth, with revisions to three measures. The Authority also adopted twenty-six additional performance measurements from the Texas Performance Plan.²²

In the BellSouth/DeltaCom Arbitration, the Authority concluded that all measurements should be reported at the Tennessee level and that BellSouth's data should be used for all calculations and measurements.²³ BellSouth was also required to provide the CLECs with the raw data and actual values used in calculating BellSouth's reported results.²⁴ These data were ordered to be provided in a readily accessible mode, such as the Internet, and be presented in a manner to allow CLECs to manipulate the raw data and create their own reports.

The Authority then adopted specific benchmarks proposed by DeltaCom for measures lacking a BellSouth retail analog. For measures with comparable retail BellSouth analogs, the Authority determined to assess parity by utilizing the Truncated Z testing methodology as proposed by BellSouth with the parameter δ , delta, set to 0.25. The Truncated Z methodology was adopted to assess whether BellSouth is providing service to

²² See *In the Matter of Application of SBC Communications, Inc., Southwestern Bell Telephone Co., Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Texas*, 15 F.C.C.R. 18,354, 15 FCC Rcd. 18,354, 2000 WL 870853 (*Memorandum Opinion and Order*) (released June 30, 2000) ¶ 427. The final Texas Performance Plan is included in the record of *In Re Petition by ICG Telecom Group, Inc. for Arbitration of Interconnection Agreement with BellSouth Telecommunications, Inc. Pursuant to Section 252(b) of the Telecommunications Act of 1996*, Docket No. 99-00377. The Arbitrators in the BellSouth/DeltaCom Arbitration took judicial notice of the ICG record without objection by the parties. See *BellSouth/DeltaCom Arbitration (Final Order of Arbitration)* (filed February 23, 2001) pp. 2-3.

²³ See *BellSouth/DeltaCom Arbitration (Final Order of Arbitration)* (filed February 23, 2001) pp. 5-7.

²⁴ See *id.*, p. 5.

CLECs at parity with its own retail unit.²⁵

In the BellSouth/DeltaCom Arbitration, the Authority adopted a two-tiered, self-enforcing remedy plan. Under this plan, payments imposed upon BellSouth for Tier 1 violations are paid directly to the affected CLEC. Assessments for Tier 2 violations are paid directly to the TRA. Tier 1 enforcement mechanism payments are triggered if a standard or benchmark is not achieved and are calculated separately for each individual CLEC. Performance levels that fall below the standard or benchmark for three (3) consecutive months trigger Tier 2 payments. The enforcement plan in the BellSouth/DeltaCom Arbitration was designed to assess payments on a per-measure basis, thus, the assessment is levied regardless of the levels of disaggregation or volume.

In the BellSouth/DeltaCom Arbitration, the Authority adopted an overall cap on enforcement mechanisms of twenty percent (20%) of “Net Returns” using ARMIS data verification of the Tennessee-specific, monetary amount.²⁶ Upon approval of interLATA authority pursuant to 47 U.S.C. § 271, the overall cap will increase to thirty-six percent (36%) of “Net Return” using ARMIS data for verification of the Tennessee-specific, monetary amount. The Authority, however, approved a waiver provision to relieve

²⁵ The Truncated Z methodology is a statistical approach to assess performance. The results produced by the methodology are themselves statistical measures. The parameter δ , delta, central to the Truncated Z methodology, is used to determine whether differences in service received by ILECs relative to CLECs is material, *i.e.*, services are provided at parity. The choice of δ , delta, defines the range of outcomes. For example, if BellSouth provides lower service levels to CLECs it may be judged to be a statistical variation rather than a failure to provide parity. Lower values of δ , delta, require BellSouth to more closely approximate or exceed the level of performance it provides to itself in order to be found to provide parity service to CLECs. Larger values for δ , delta, allow BellSouth greater leeway to provide service at a lower level to the CLECs than itself, while statistically still providing parity service under the Truncated Z methodology. Although a measurement may indicate that BellSouth provided service to a CLEC at a level lower than the quality it provided to itself, this measurement may not imply that BellSouth is not providing service at parity.

²⁶ ARMIS is an acronym for Automated Reporting Management Information System. ARMIS reports contain key financial, operational, infrastructural and service quality control information on the largest incumbent local exchange carriers in a standard format.

BellSouth of its liability under Tier 1 and Tier 2 in cases where BellSouth's performance failure is caused by circumstances beyond BellSouth's control.

C. The Positions of the Parties

(1) BellSouth

In this docket, BellSouth contends that the performance measurements, benchmarks and enforcement mechanisms adopted in the BellSouth/DeltaCom Arbitration require revision in three primary areas. First, BellSouth asserts that the 1999 SQMs adopted in the BellSouth/DeltaCom Arbitration must be updated, arguing that the Authority should use BellSouth's 2001 SQMs. The 2001 SQMs are enhanced by the inclusion of additional measurements in all categories.²⁷ Second, BellSouth proposes the elimination of a number of performance measurements previously ordered by the Texas Public Service Commission, arguing that the measurements are unnecessary or duplicative and do not reflect changes in BellSouth's definitions and business rules.²⁸ Third, BellSouth seeks revision of the enforcement mechanisms adopted in the BellSouth/DeltaCom Arbitration, arguing that those enforcement mechanisms are excessive and are not limited to those "key process measures in areas that affect customers."²⁹ In support of its position, BellSouth maintains that the FCC rejects the argument that all measures used to monitor performance

²⁷ Direct testimony of David A. Coon (filed July 16, 2001) pp. 1-1 through 1-14.

²⁸ Direct testimony of David A. Coon (filed July 16, 2001) pp. 30-32, 43.

²⁹ Direct testimony of David A. Coon (filed July 16, 2001) pp. 22-23. BellSouth identifies four situations in which it believes that a measurement should not have enforcement mechanisms: (1) where a measurement is duplicative or correlated with other measurements to avoid imposing more than one penalty for the same event; (2) where specific CLEC identification cannot be made (which would preclude Tier 1 enforcement mechanisms); (3) where a measure is diagnostic only; and (4) where the measurement is of a process that is in parity by design.

should be included in the enforcement plan.³⁰

BellSouth proposes that the Authority adopt BellSouth's own Self-Effectuating Enforcement Mechanism Plan ("SEEM"). Under SEEM, enforcement mechanisms are attached to only a few of the 1,200 sub-metrics for measuring performance data included in BellSouth's SQM Plan. In some cases, BellSouth's SEEM applies enforcement mechanisms to select individual sub-metrics. In other cases, SEEM applies enforcement mechanisms to groups of several sub-metrics.³¹ Some measurements of BellSouth wholesale service to CLECs are calculated against a benchmark (e.g., 95%), whereas others are calculated against parity with the same or similar service BellSouth provides to its own retail operations. BellSouth claims that it has applied its own experience to determine suitable levels of disaggregation to provide a meaningful basis with which to compare CLEC and BellSouth experience.³²

Under BellSouth's transaction-based approach, enforcement mechanisms are

³⁰ Direct testimony of David A. Coon (filed July 16, 2001) p. 24 (quoting *Application by Bell Atlantic New York for Authorization under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York*, CC Docket No. 99-295, 15 FCC Rcd. 3953, 3989-90, ¶ 439 (Released December 22, 1999) (Memorandum Opinion and Order) ("*Bell Atlantic New York Order*"). The portion of the paragraph quoted by BellSouth states:

439. We also believe that the scope of performance covered by the Carrier-to-Carrier metrics is sufficiently comprehensive, and that the New York Commission reasonably selected key competition-affecting metrics from this list for inclusion in the enforcement plan. We disagree with commenters who suggest that additional metrics must be added to the plan in order to ensure its effectiveness, and note that the New York Commission has considered and rejected similar arguments. Moreover, we note that the New York Commission has indicated that it will consider adding new metrics, if necessary, in the future. Indeed, in light of the ongoing development of xDSL-related measurements related to xDSL-capable loops in New York, we are not concerned that the APAP [Amended Performance Assurance Plan] does not contain such measurements at present. The New York Commission has stated that it expects to adopt measurements addressing xDSL-capable loops once their development is complete. Accordingly, we expect Bell Atlantic to work with the New York Commission in developing performance measurements for xDSL-capable loops, and to incorporate these measurements into its "Carrier-to-Carrier" reports and the APAP.

³¹ Direct testimony of David A. Coon (filed July 16, 2001) pp. 5-10.

³² *Id.*, p. 33.

determined by multiplying BellSouth's fee per affected item (or transaction) by the number of transactions to be remedied. This plan imposes enforcement mechanisms proportional to the number of transactions that suffer sub-par performance. For measurements in which a benchmark applies, BellSouth proposes paying a penalty per transaction multiplied by the number of transactions that missed the mark. For measurements in which retail parity applies, BellSouth proposes applying a formula to the total number of transactions to determine the number of transactions warranting the imposition of a penalty.³³

BellSouth objects to the magnitude of the enforcement mechanisms adopted in the BellSouth/DeltaCom Arbitration.³⁴ BellSouth contends that the Authority radically adjusted BellSouth's proposed fee schedule based on DeltaCom's proposed payment amounts without taking into account the fundamental differences between the BellSouth and DeltaCom plans in terms of the size of the penalty payments adopted by each plan. BellSouth maintains that payments under the DeltaCom plan were based solely on whether a measurement was missed without regard to the number of transactions involved.³⁵

In addition, BellSouth asserts that an annual absolute cap on enforcement mechanisms of thirty-six percent (36%) of its net operating revenues resulting from its Tennessee operations, applicable only after interLATA authority is granted, is sufficient to prevent backsliding.³⁶

³³ *Id.*, pp. 83-84; Exhibit DAC-2, Appendix E. BellSouth also opposes the imposition of enforcement mechanisms for filing late or inaccurate reports. BellSouth does not contest the necessity for an annual auditing process to monitor SQMs and reports, but argues that the cost of audits should be split equally by BellSouth and the CLECs.

³⁴ Comments of BellSouth inserted into the matrix requested by the TRA (filed August 20, 2001) Matrix III and Appendix 4.

³⁵ Direct testimony of David A. Coon (filed July 16, 2001) pp. 85-86.

³⁶ *Id.*, pp. 25-27.

BellSouth objects to the levels of disaggregation adopted in the BellSouth/DeltaCom Arbitration, particularly the decision to disaggregate all measures to the state level.³⁷ BellSouth contends that many of the metrics are regional and cannot be reported on a state-specific basis.³⁸ BellSouth also takes issue with the benchmarks adopted for certain metrics in the BellSouth/DeltaCom Arbitration, arguing that levels of parity are unreasonable.³⁹

BellSouth accepts the use of the Truncated Z statistical methodology for determining parity with the degree of aggregation adopted in the BellSouth/DeltaCom Arbitration. BellSouth argues, however, that the value of δ , delta, was set too low. BellSouth advocates a value of δ , delta, of 1.0. BellSouth requests that the Authority set a value of δ , delta, with the understanding that the value would be reviewed in six (6) months.

Further, BellSouth argues that the TRA lacks the authority to impose the self-effectuating enforcement mechanisms ordered in BellSouth/DeltaCom Arbitration prior to approval under 47 U.S.C. § 271.⁴⁰ BellSouth contends that the purpose of enforcement mechanisms is to prevent backsliding after such approval is obtained and it will consent to the imposition of enforcement mechanisms only after § 271 approval. BellSouth challenges the Authority's jurisdiction to impose Tier 1 payments that essentially function as liquidated damages. BellSouth further asserts that the TRA's authority to impose Tier 2 enforcement mechanisms is limited by Tennessee statutes, specifically, Tenn. Code Ann. §

³⁷ *Id.*, p. 22.

³⁸ *Id.*, pp. 60-61.

³⁹ *Id.*, p. 71.

⁴⁰ In a March 28, 2002 letter to the Authority, BellSouth stated that to the extent that the Georgia Public Service Commission adopts modifications to the Georgia SQM, BellSouth will agree to implement such modifications in Tennessee, including Georgia's Self-Effectuating Enforcement Mechanism Plan.

65-4-120, which imposes a statutory maximum penalty of fifty dollars (\$50) for each day a public utility fails to comply with a lawful order, judgment, finding, rule or requirement of the Authority.

BellSouth maintains that the CLECs failed to demonstrate the need for performance measurements for special access services. BellSouth argues that key measurements are already provided in the tariffs from which special access services may be obtained.

(2) The CLECs

The CLECs endorse most of the performance measurements, benchmarks and enforcement mechanisms adopted in the BellSouth/DeltaCom Arbitration, but seek some additional metrics.⁴¹ Maintaining that benchmarks must be set at levels that provide them with a meaningful opportunity to compete, the CLECs propose approximately fifty (50) benchmarks with all but a few set at ninety five percent (95%) or above.⁴² The CLECs support the adoption of the newer, more expansive SQMs used in reports to the Georgia Public Service Commission.⁴³ In response to BellSouth's contention that some of the performance measurements should be eliminated as duplicative or correlated with other measures, the CLECs maintain that the existing industry-developed correlation analyses fail to validate correlation between measures,⁴⁴ and no proposal to establish correlation should be undertaken until the remedy plan has been in effect for at least six (6) months.⁴⁵

The CLECs support the level of disaggregation in the BellSouth/DeltaCom Arbitration, but propose to add several new products to the disaggregation.⁴⁶ In addition to

⁴¹ Hearing testimony of Karen Kinard (August 23, 2001) pp. 45-46, 138, 151.

⁴² *Id.*, pp.143-144.

⁴³ Direct testimony of Karen Kinard (filed July 16, 2001) pp. 22, 37.

⁴⁴ Direct testimony of Cheryl Bursh (filed July 16, 2001) pp. 10-11; Rebuttal testimony of Cheryl Bursh (filed August 10, 2001) p. 18.

⁴⁵ Rebuttal testimony of Cheryl Bursh (filed August 10, 2001) Attachment E.

⁴⁶ Hearing testimony of Karen Kinard (filed August 23, 2001) pp. 46, 151, 185.

an annual audit, the CLECs propose that they each be permitted to request a series of mini-audits of up to two (2) or three (3) per year focused on individual performance measurements or submetrics.⁴⁷

The CLECs favor the use of a Modified Z without aggregation, but would accept the use of the Truncated Z using the aggregation established in the BellSouth/DeltaCom Arbitration.⁴⁸ As to the value of δ , delta, the CLECs support the δ , delta, value of 0.25% adopted in the BellSouth/DeltaCom Arbitration.⁴⁹

The CLECs propose that the Authority adopt the procedure for calculating Tier 1 remedy payments offered by DeltaCom in the BellSouth/DeltaCom Arbitration in its “Best and Final Offer,” with a few modifications to these remedy payments.⁵⁰ The CLECs contend that Tier 2 enforcement mechanisms should rise proportionately with the severity of BellSouth’s failures and that BellSouth should make higher Tier 2 payments in areas in which the CLECs have a lower market share.⁵¹

The CLECs assert that the TRA has the legal authority under the Telecommunications Act of 1996, 47 U.S.C. § 151 *et seq.*, to impose a self-executing remedy plan without BellSouth’s consent.⁵² The CLECs also maintain that the TRA has this authority because BellSouth tariffs approved by the TRA contain self-effectuating performance measures and guarantees. In addition, the 1996 Act requires the TRA to

⁴⁷ *Id.*, pp. 57, 162.

⁴⁸ Hearing testimony of Robert Bell (filed August 23, 2001) pp. 189-190. The major difference between the Truncated Z and the Modified Z is in the method of aggregation. For those measures for which BellSouth’s performance for the CLECs exceeds (*e.g.*, is better than) parity, the Truncated Z sets the value of that measure to zero or “truncates” it before the aggregation process is carried out. The Modified Z does not. If there were no aggregation, the methods would be the same.

⁴⁹ Hearing testimony of Robert Bell (filed August 23, 2001) p. 191.

⁵⁰ Hearing testimony of Cheryl Bursh (filed August 23, 2001) p. 216.

⁵¹ Direct testimony of Cheryl Bursh (filed July 16, 2001) pp. 17-19.

⁵² *Id.* p. 25.

arbitrate issues presented to it by the parties to interconnection agreements. The CLECs further contend that self-executing remedies are necessary to enforce the market opening provisions of 47 U.S.C. § 251 and it is useless to create standards without incentives for BellSouth to abide by them.⁵³

The CLECs also propose that BellSouth pay \$5,000 per day for untimely posting of performance data and reports. In instances where BellSouth provides incomplete or inaccurate performance data and reports, the CLECs contend that BellSouth should pay \$1,000 per day for each day past the original due date that the reports remain uncorrected.⁵⁴

The CLECs suggest that the Authority adopt a procedural cap on enforcement mechanisms instead of the absolute cap that BellSouth proposes. They argue that, under an absolute cap, BellSouth could simply calculate its enforcement mechanisms for providing poor service to CLECs as a cost of doing business and after BellSouth reaches its absolute cap, further deterioration in performance becomes irrelevant. Furthermore, the CLECs maintain that an absolute cap would create complexity and ambiguity regarding the apportionment of legitimate remedies among CLECs, and between the CLECs and the State. Under the CLECs' proposal, BellSouth would continue to make Tier 2 payments into an interest-bearing registry or escrow account during any proceedings to challenge the enforcement mechanisms assessed. The Authority would then decide whether, and to what extent, remedies in excess of the procedural cap should be paid. Under the CLECs' plan, a

⁵³ *Id.*, pp. 3-5.

⁵⁴ *Id.*, p. 20.

procedural cap would not obviate BellSouth's obligation to continue making Tier 1 payments to individual CLECs.⁵⁵

Both Time Warner and WorldCom agree on the need for a performance incentive plan for high capacity special access services provided by BellSouth through intrastate and interstate tariffs and that special access services are critical to the development of effective local and interstate competition.⁵⁶ Each propose separate performance measurements.

D. The April 16, 2002 Authority Conference

During the April 16, 2002 Authority Conference, the Directors considered the adoption of the performance measurements, benchmarks and enforcement mechanisms described in sections E and F below and attached hereto as Exhibit A. The Directors voted unanimously to adopt the performance measurements, benchmarks and enforcement mechanisms set forth in sections E and F. A majority of the Directors also voted to adopt a six (6) month review of the performance measurements, benchmarks and enforcement mechanisms.⁵⁷ The Directors also voted unanimously to adopt a performance measurement plan for assessing the availability of intrastate special access services. The performance measurement plan for intrastate special access services is attached hereto as Exhibit B.

E. Standards and Benchmarks for the Measurements and the Methodology for Defining and Calculating Standards and Benchmarks

The comprehensive set of performance measures attached hereto as Exhibit A have been developed to establish and assess the level of service that BellSouth provides to

⁵⁵ Direct testimony of Cheryl Bursh (filed July 16, 2001) pp. 21-23.

⁵⁶ Rebuttal testimony of Karen Furbish (filed August 10, 2001) p. 4.

⁵⁷ Chairman Kyle did not vote with the majority on the ground that she did not support limitations on the parties' access to the review process. The Chairman favored a review process that would permit the Authority to work with the parties on an as-needed basis.

CLECs to assure nondiscriminatory access to UNEs.⁵⁸ The benchmarks for the performance measurements adopted herein represent levels of service that BellSouth must achieve in order to meet the requirement of nondiscriminatory access.⁵⁹

The performance measurements adopted by the Authority, attached to this Order as Exhibit A, shall be used to evaluate whether BellSouth is providing nondiscriminatory access to its network. The Authority declined to adopt the additional metrics proposed by the CLECs because they are duplicative of those included in the 2001 SQMs proposed by BellSouth. Nevertheless, certain standards, business rules, and disaggregation levels proposed by the CLECs have been incorporated into the measurements of Acknowledgment Message Timeliness, Call Abandonment Rate Ordering and Provisioning, Percent Firm Order Confirmation, Reject Response Completeness and Speed of Answer in the Ordering Center. BellSouth's business rules are adopted, with the modifications included in Exhibit A.⁶⁰

The Authority's Order in the BellSouth/DeltaCom Arbitration emphasized the necessity of adopting standards and benchmarks that are specific and measureable.⁶¹ Consistent with that finding, the Authority adopts the benchmarks as set forth in Exhibit A, that represent the most stringent benchmarks that have been adopted in other BellSouth states. The primary goal of these benchmarks is to prevent CLECs operating in Tennessee

⁵⁸ A Tennessee competing carrier that has entered into an interconnection agreement containing language permitting it to seek the incorporation of the performance measurements, benchmarks and enforcement mechanisms adopted herein into that agreement may notify BellSouth and the Authority of its position. A Tennessee competing carrier negotiating an interconnection agreement has an unfettered right, unless it voluntarily agrees otherwise, to have the performance measurements, benchmarks and enforcement mechanisms adopted herein become a part of that agreement.

⁵⁹ See 47 U.S.C. § 251(c)(3).

⁶⁰ The modifications relate to TN-P-14: Percent of Timely Loop Modification/De-Conditioning on xDSL Loops and TN-P-16: Service Order Accuracy.

⁶¹ See *BellSouth/DeltaCom Arbitration (Final Order)* (filed February 23, 2001) p. 7.

from receiving service inferior to that which BellSouth provides to itself or CLECs operating in other states. Achievement of this goal should assist the state in attracting and retaining technologically advanced and successful CLECs and business customers.

The Authority further adopts the levels of product disaggregation as provided in Exhibit A. These levels of disaggregation are specific to the type of process, such as pre-ordering, ordering and provisioning. The levels adopted are sufficiently specific to prevent the masking of discrimination by ensuring that poor performance for one product type is not aggregated with superior service of another unrelated product type. BellSouth shall report measurement data at the state level and specific to each CLEC and provide the CLECs with access to the raw data in the electronic medium adopted in the BellSouth/DeltaCom Arbitration.

The Truncated Z methodology is hereby adopted to assess parity for measures with comparable retail BellSouth analogs. The parameter δ , delta, is established at 0.25.⁶²

F. Enforcement Mechanisms

The exercise of this agency's authority to implement self-effectuating enforcement mechanisms is consistent with both state and federal law and is justified in this docket by the unique procedural posture of this case. This docket was opened at the February 21, 2001 Authority Conference as a generic docket in order to establish a uniform set of performance measurements applicable to all interconnection agreements.⁶³ In creating this

⁶² The parties presented no evidence demonstrating that the value set for δ , delta, in the BellSouth/DeltaCom Arbitration. 0.25, was inappropriate. Further, the statistical methodology for determining δ , delta, is so complex that it is very difficult to evaluate the effect of different values of δ , delta, in the absence of actual experience. Therefore, the smaller value, along with the six month review, was chosen to allow for rapid adjustment if the 0.25 value results in an unreasonable standard for BellSouth's performance.

⁶³ See *id.*

docket, the Authority consolidated TRA Docket Nos. 99-00347 and 00-00392.⁶⁴

Docket No. 00-00392 was commenced upon BellSouth's filing of its *Petition to Convene Generic Docket and to Resolve Pending Arbitration Issues*. In its *Petition*, BellSouth requested the TRA "to convene a generic docket to address performance measurements and enforcement mechanisms for the competing local exchange carrier ("CLEC") industry in Tennessee," and "to resolve issues raised in pending arbitration proceedings concerning performance measurements and enforcement mechanisms by referring those issues to the generic docket."⁶⁵ BellSouth stated further,

In this manner, the Authority can address performance measurements and enforcement mechanisms **in a single proceeding**, rather than on a piecemeal basis, which is consistent with principles of administrative efficiency and reasoned decision making.⁶⁶

In making this request, BellSouth acknowledged that the performance measurements and enforcement mechanisms in the BellSouth/DeltaCom Arbitration "were 'interim' in nature" and "should remain in effect until this Authority conducts a generic proceeding to adopt permanent performance measurements with standards and enforcement mechanisms applicable to all CLECs."⁶⁷

In its request, BellSouth did not suggest that the Authority should postpone or delay action until it received FCC approval pursuant to 47 U.S.C. § 271. Rather BellSouth

⁶⁴ See *Third Party Testing of BellSouth Telecommunications Inc.'s Operational Support Systems*, TRA Docket No. 99-00347; *BellSouth Telecommunications, Inc. Petition to Convene Generic Docket and to Resolve Pending Arbitration Issues*, TRA Docket No. 00-00392; see also *In Re Docket to Establish Generic Performance Measurements for BellSouth Telecommunications, Inc.*, (hereinafter *Performance Measurements Docket*) TRA Docket No. 01-00193 (*Order Consolidating Docket Nos. 99-0000347 and 00-00392 into Docket No. 01-00193 and Docket No. 01-00362*) (filed May 15, 2001) p. 6.

⁶⁵ See *Performance Measurements Docket (Petition to Convene Generic Docket and to Resolve Pending Arbitration Issues)* (filed May 17, 2000) p. 1.

⁶⁶ *Id.* (Emphasis added).

⁶⁷ *Id.*, p. 2 (quoting *BellSouth/DeltaCom Arbitration* (Transcript of April 4, 2000 Proceedings) p. 16).

urged, “The Authority should convene that generic proceeding now.”⁶⁸ Further, in asking for relief, BellSouth reiterated that the Authority “should refer all issues relating to performance measurements and enforcement mechanisms currently pending in the various arbitrations to this generic docket.”⁶⁹

During the Authority Conference on February 21, 2001, the Directors addressed the need for resolving performance measurement and enforcement mechanism issues pending in several dockets. The Authority determined that the establishment of a single set of performance measurements applicable to all interconnection agreements is desirable and that such standard measurements would ensure consistency in the performance measurements applicable to all CLECs. The Authority also found that the adoption of an ongoing performance measurement program with built-in enforcement mechanisms would provide the Authority with a tool to assure that BellSouth was offering nondiscriminatory access to its network in a competitively neutral manner.⁷⁰

At the February 21, 2001 Authority Conference, the Directors discussed the steps necessary to ensure BellSouth’s compliance with the performance measurements and unanimously decided to implement these steps in two separate dockets. Specifically, the Authority consolidated Docket No. 99-00347 (*Third Party Testing Of BellSouth’s Operational Support Systems*) with Docket No. 00-00392 (*BellSouth Telecommunications, Inc.’s Petition To Convene Generic Docket And To Resolve Pending Arbitration Issues*) to form the single, new docket, No. 01-00193 (*Docket To Establish Generic Performance Measurements, Benchmarks and Enforcement Mechanisms for BellSouth*

⁶⁸ *Id.*

⁶⁹ *Id.*, p. 3.

⁷⁰ Transcript of February 21, 2002 Authority Conference, pp. 17-18.

Telecommunications, Inc.) expressly “for the purpose of establishing generic performance measurements, benchmarks and enforcement mechanisms for BellSouth Telecommunications, Inc.”⁷¹ Further, the Authority ordered that

A single set of standard performance measurements and benchmarks shall be established in Docket No. 01-00193 with those established in Docket No. 99-00430 (*In Re Petition for Arbitration of ITC^DeltaCom Communications, Inc. with BellSouth Telecommunications, Inc. Pursuant to the Telecommunications Act of 1996*) being used as the starting point in said determination.⁷²

The Authority determined that proceedings held in Docket No. 01-00193 would determine any necessary changes to the base measurements, benchmarks and enforcement adopted in the BellSouth/DeltaCom Arbitration.

Initially in the BellSouth/DeltaCom Arbitration, BellSouth argued, as it has in this docket, that because it did not agree to proposed enforcement mechanisms in the form of penalties and liquidated damages, the TRA did not have the statutory authority to adopt involuntary, self-effectuating enforcement mechanisms. The Authority, however, specifically found that it had the authority to arbitrate and therefore to impose enforcement mechanisms.⁷³

During their April 4, 2000 deliberations in the BellSouth/DeltaCom Arbitration, the Directors, acting as Arbitrators pursuant to 47 U.S.C. § 252, unanimously voted to adopt performance measurements and benchmarks with enforcement mechanisms, which were to “be treated as proxy measurements and enforcement mechanisms.”⁷⁴ The Directors stated,

⁷¹ *Performance Measurements Docket (Order Consolidating Docket Nos. 99-00347 and 00-00392 into Docket No. 01-00193 and Opening Docket No. 01-00362)* (filed May 15, 2001) p. 9. At this same Authority Conference, the Authority convened Docket No. 00-00362 for the purpose of determining whether the Authority could rely on existing data or test results from other states’ OSS testing and which tests might be required to be conducted separately in Tennessee.

⁷² *Id.*

⁷³ *See BellSouth/DeltaCom Arbitration (Interim Order)* (filed August 11, 2000) p. 12.

⁷⁴ *Id.* (Transcript of April 4, 2000 Proceedings) p. 18.

“Should this Authority adopt generic measurements and enforcement mechanisms in another proceeding, those will replace the proxies adopted in this proceeding.”⁷⁵ The August 11, 2000 Order in the BellSouth/DeltaCom Arbitration memorializing the Authority’s actions stated specifically:

the Arbitrators find that the interconnection agreement should include performance measures and enforcement mechanisms. These measures and mechanisms should remain in effect permanently or until this Authority conducts a generic proceeding to adopt permanent performance measures and enforcement mechanisms applicable to all CLECs.⁷⁶

The enforcement measures adopted in this docket arise out of the BellSouth/DeltaCom Arbitration, are based on the same authority as that exercised in the BellSouth/DeltaCom Arbitration and are consistent with state law.

Without a system of enforcement mechanisms, this agency cannot fulfill its obligation under both state and federal law to ensure that CLECs are able to compete in Tennessee. Performance measurements, without enforcement mechanisms to provide explicit, concrete consequences for unsatisfactory performance, are virtually meaningless. Accordingly, the Authority adopts a transaction-based remedy plan consisting of Tier 1 and Tier 2 enforcement mechanisms. Tier 1 enforcement mechanisms, payable to the CLECs, are triggered if a benchmark is not achieved at the lowest level of disaggregation. Tier 2 enforcement mechanisms, payable to the Authority, are triggered if performance falls below the established benchmark for three (3) consecutive months.⁷⁷ BellSouth’s

⁷⁵ *Id.*

⁷⁶ *Id. (Interim Order)* (filed August 11, 2000) p. 12. BellSouth moved for reconsideration of the Interim Order, but did not challenge the TRA’s authority to establish enforcement mechanisms. Instead, BellSouth asked the Authority to reconsider its decision on the ground that it did not want to be required to put SQMs into place on an “interim basis” while the Authority was in the process of considering the establishment of performance measurements, benchmarks and enforcement mechanisms in a generic docket. *BellSouth’s Motion for Reconsideration and Clarification* (filed August 28, 2000) p. 17.

⁷⁷ The performance measurements included in Exhibit A are limited to those determined to be truly customer impacting. Measurements that are truly diagnostic or are parity by design carry no enforcement mechanisms.

proposed categories and remedy amounts are adopted, with the inclusion of “database updates” as a category as set forth in Exhibit A.

Tier 2 enforcement mechanisms represent a designated payment to the state resulting from BellSouth’s systemic failure to provide adequate service to the CLEC community. Accordingly, the Tier 2 enforcement mechanisms rendered in this generic docket are mandatory and not subject to negotiation by parties. While a CLEC may negotiate Tier 1 enforcement mechanisms that differ from those ordered in this docket in order to gain favorable concessions from BellSouth, BellSouth shall continue measuring performance to that particular CLEC regardless of the agreement reached between the parties.⁷⁸ Tier 2 enforcement mechanisms, which evaluate the overall service provided to all CLECs, cannot be calculated without such data for all CLECs, even those entering into separate agreements with BellSouth as to Tier 1 payments. Moreover, the continued requirement of collecting performance data for a CLEC opting out of Tier 1 payments still gives BellSouth the incentive to provide adequate service to that particular CLEC due to the presence the Tier 2 enforcement mechanisms.

BellSouth shall file monthly reports detailing the amount of Tier 1 payments made and/or due for failed performance. This report shall include detailed calculations for each Tier 1 mechanism triggered and paid to each CLEC and the associated benchmark missed and the dollar amounts paid to each CLEC for missing associated benchmarks. The report shall also include detailed calculations for Tier 2 payments triggered due to failed performance. BellSouth shall provide this report to individually affected CLECs and the

⁷⁸ The continued measuring and reporting of performance after a negotiated settlement shall be consistent with this Order and its Exhibits.

TRA in conjunction with any and all payments.⁷⁹ Reports and payments for failed performance shall be submitted no later than thirty (30) days after the end of the month to be reported. For example, the report and payments of June's performance will be due no later than July 30th. Enforcement mechanism payments shall be kept separate from other billing practices. A "bill and keep" approach is prohibited.

The overall cap on enforcement mechanism payments shall be equal to twenty percent (20%) of BellSouth's "net return" using ARMIS data verification. The cap shall increase to thirty-six percent (36%) after BellSouth receives approval of interLATA authority pursuant to 47 U.S.C. § 271.⁸⁰

The waiver process adopted in the BellSouth/DeltaCom Arbitration is adopted here. This includes a provision to relieve BellSouth of its liability for Tier 1 and Tier 2 enforcement mechanisms in cases when BellSouth's performance failure is caused by circumstances beyond BellSouth's control.⁸¹

G. Special Access Services

The same rationale for establishing performance measurements for UNE processes supports the establishment of performance measurements for special access services. Monitoring special access services will promote competition, prevent discrimination in both local and long distance markets and provide BellSouth with an incentive to maintain

⁷⁹ In the event that BellSouth fails to provide timely reports as required herein, the TRA, on its own motion or upon that of the parties, may take appropriate action to require BellSouth to comply with this Order.

⁸⁰ The potential exists for the cap to be reached and BellSouth's conduct thereafter to deteriorate. In the event of such an occurrence, the TRA, on its own motion or upon that of the parties, may take appropriate action to require BellSouth to comply with the performance measurements provided in this Order.

⁸¹ If BellSouth withholds payment due under the enforcement mechanisms adopted herein on the ground that its failure to conform to this Order was due to circumstances beyond its control and, after notice and a hearing, the Authority, upon its own motion or that of an interested party, subsequently determines that BellSouth did not act in good faith in pursuing the waiver process, the Authority may take appropriate action.

high levels of service after it receives approval under 47 U.S.C. § 271. The Directors adopt, with modifications stated during the Authority Conference, the performance measurements contained in the document entitled "Measurements & Standards in the Ordering, Provisioning and Maintenance and Repair of Access Service," which is attached as Attachment 2 to the Rebuttal testimony of WorldCom witness Karen Furbish. These performance measurements, with the modifications, are attached hereto as Exhibit B.

H. Required Filings

During the deliberations, the parties were directed to submit to the Authority business rules for the adopted measurement "*Percent of Timely Loop Modification/DeConditioning on xDSL Loops*" and proposed revisions to the business rules clarifying the "statistically valid" sampling techniques for the adopted measurement "*Service Order Accuracy.*"

BellSouth shall submit to the Authority a detailed plan to expand the number of products eligible for flow-through as listed in its LSR Flow-Through Matrix. The percent of products eligible shall be increased from fifty-seven percent (57%) to ninety-five percent (95%). BellSouth shall include in this filing a description of the methods it intends to use to improve its systems to expand the number of product types eligible for flow-through and a time-table for such improvement. This plan shall be submitted to the Authority within ninety (90) days from the date the Authority issues this Order.

I. Audits

Annual audits of the data gathering and collection process shall be conducted by an independent third party auditor. The initial audit shall commence twelve (12) months from the date the Authority issues this Order. BellSouth shall pay fifty percent (50%) of the cost

of the audit. The remaining costs shall be divided equally among other parties to this action.

J. Dates of Implementation

The Exhibits attached hereto include a number of implementation dates. For example, the implementation date of “Average Response Time and Response Interval (Pre-Ordering/Ordering)” is “Ten (10) days after the Authority issues a final order, unless otherwise ordered.”⁸² The time for calculating each of the implementation dates included in Exhibit A and B shall commence on the date the Authority issues this Order.

K. Six Month Review

In recognition that the telecommunications environment continues to evolve and the needs of the parties may change, the Authority adopts a review process to evaluate and appropriately revise, if necessary, the performance measurements, benchmarks and enforcement mechanisms, including the overall cap, adopted herein. The initial review shall commence six (6) months from the date this Order is issued. Subsequent reviews shall be conducted annually from the date this Order is issued. During the review process, the Authority will solicit comments from the parties regarding the efficacy of the performance measurements, benchmarks and enforcement mechanisms.

IT IS THEREFORE ORDERED THAT:

1. The performance measurements, benchmarks and enforcement mechanisms set forth in Exhibit A (attached hereto) are hereby adopted and shall be implemented as stated in Exhibit A. The time for calculating each of the implementation dates included in

⁸² Exhibit A, pp. 6, 7.

Exhibit A shall commence from the date the Authority issues this Order.

2. BellSouth shall file monthly reports detailing the amount of the Tier 1 and Tier 2 payments made and/or due for failed performance and the associated benchmarks missed. Reports and payments for failed performance shall be submitted no later than thirty (30) days after the end of the month to be reported.

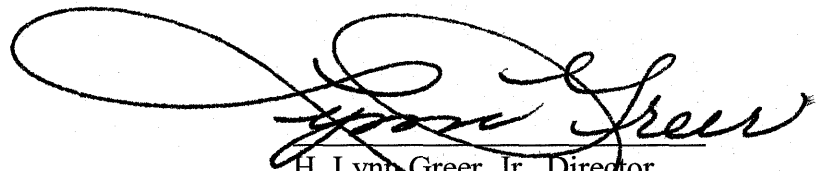
3. The performance measurements for special access set forth in Exhibit B are hereby adopted. The time for calculating each of the implementation dates included in Exhibit B shall commence from the date the Authority issues this Order.

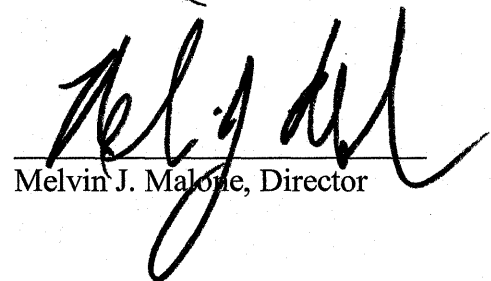
4. BellSouth shall submit to the Authority a detailed plan to expand the number of products eligible for flow-through as listed in its LSR Flow-Through Matrix within ninety (90) days from the date the Authority issues this Order.

5. The Authority shall retain an independent third party auditor to conduct annual audits of the data gathering and collection process adopted herein. BellSouth shall pay fifty percent (50%) of the cost of the audit and the remaining costs shall be divided equally among the other parties to this action.


6. Six months from the date the Authority issues this Order, the Authority shall convene proceedings to review the efficacy of the performance measurements, benchmarks and enforcement mechanisms adopted herein.


Sara Kyle, Chairman


H. Lynn Greer, Jr., Director


Melvin J. Malone, Director

ATTEST:


K. David Waddell, Executive Secretary

¹ Chairman Kyle did not vote with the majority regarding the review after six (6) months. See fn. 57. During the April 16, 2002 Authority Conference, Chairman Kyle stated:

I want to thank the parties involved and our staff for an outstanding job. Of course, there is a lot involved that will need ongoing attention and adjustment. This docket is a step to move toward 271 approval, and I see this as a great benefit to Tennessee consumers. And I want you to know that I'm ready to take steps necessary, steps that are appropriate to work with the parties on adjustments that might be needed from this decision today. I will agree with the motion except for the six-month review. I will work with the parties on an as-needed basis. I think this is a road map for CLECs and expectations for Bell which we can work towards achieving. The resolution of this docket adds clarity and consistency and a smoother path for competition in Tennessee which is the goal of the General Assembly and a goal of mine. I'm here to help when circumstances deem necessary. Thank you.